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Supreme Court, U.S.
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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN R. WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was petitioner's motion for disqualification of the district court judge timely when motion was filed four and one-half years after litigation began?

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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN R. WILLNER,
Petitioner,

vs.

UNIVERSITY OF KANSAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent University of Kansas respectfully requests that the Court deny the issuance of a petition for a writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on June 1, 1988. The opinion is reported at 848 F.2d 1020.

STATEMENT OF THE CASE

Petitioner was hired as an associate professor of political science at the University of Kansas in 1969 and has continued as an employee of the University since that time. In April, 1979, petitioner filed suit against the University of Kansas in the federal District Court of Kansas in Topeka, Kansas, where the Honorable Richard D. Rogers sits as the sole district court judge. Petitioner alleged discrimination on the basis of sex in salary matters and retaliation by the University of Kansas, pursuant to 42 U.S.C. §2000 *et seq*. Petitioner was represented by three successive attorneys before she began acting as a *pro se* litigant.

Four and one-half years of litigation passed and many pleadings were filed before petitioner filed her first motion for disqualification of the district court judge on September 28, 1983. At no time in this case has petitioner provided the reason for her waiting so long to present her motion. The Tenth Circuit stated in its opinion: "In the intervening four years she had twice amended her complaint . . . and considerable discovery had been completed." (Petitioner's Appendix A, p. A8) The trial court, in denying petitioner's motion, addressed each of the allegations by plaintiff for her moving for disqualification of the judge. *See* Respondent's Appendix A, p. A1, *infra*, District Court's Order, Doc. No. 311, 8/30/84 (Rogers, D.J.), Since the district court ruled the same day on a similar disqualification motion filed by petitioner's sister, who was appearing *pro se* in her own case against the University of Kansas, the court attached a copy of its opinion in the case of *Dorothy Willner v. University of Kansas*, Dist. Ct. Case No. 82-4291, to its order in the present action. *See* Appendix B, p. A4, *infra*, Memorandum and Order, Doc. No. 128, 8/30/84 (Rogers, D.J.).

In considering the allegations of this petitioner and those of her sister, Judge Richard Rogers stated: "Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The Court has no knowledge of this case other than

what I have learned from perusing the court file." *See* p. A8, *infra*. The judge then applied the "reasonable, objective man" standard for reviewing a motion for recusal. *See* p. A8, *infra*. Judge Rogers held that he did not believe his "past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do not think that a reasonable man would doubt my impartiality under these circumstances." *See* p. A8, *infra*. The Alumni Association is a separate entity from the University of Kansas and plays no role in the hiring, promotion and salary decisions for University employees, including faculty members of the political science department like petitioner.

Almost six years after her case had been on file, petitioner filed a second motion for disqualification on January 2, 1985. In this motion, she reiterated her earlier grounds for disqualification and alleged one new ground: Judge Rogers' position on the Law School Board of Governors for the KU Law Society. This society, whose members are alumni of the law school, does not consider or decide employment matters about University personnel. The district court denied this motion on March 11, 1985. *See* Appendix C, p. A20, *infra*, Order, Doc. No. 339, 3/11/85 (Rogers, D.J.) On February 20, 1985, petitioner filed a petition with the Tenth Circuit for a writ of mandamus to disqualify both the U.S. magistrate and the district court judge in this proceeding. The Tenth Circuit denied this petition on March 27, 1985.

In May, 1985, represented by counsel again, petitioner presented her Equal Pay Act claim in a five-day trial to a jury which determined the issues on the merits against petitioner. Subsequently, on August 2, 1985, the District Court determined and entered judgment on the Title VII claims against petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED

No real conflict exists among the circuit courts concerning the need for motions for judicial disqualification to be timely filed.

The sole Question Presented in the petition is whether petitioner's motion for disqualification of the district court judge was timely when petitioner filed her motion four and one-half years after the litigation began. This Court, in addressing a §455 motion, held in *Liljeberg v. Health Services Corp.*, —U.S. —, 108 S.Ct. 2194, 2206, 100 L.Ed. 2d 855, 877 (1988) (emphasis added) that "*unless* it can be said that respondent did not make a timely request for relief," it was appropriate to vacate the judgment. In *Liljeberg*, 108 S.Ct. 2194, this Court recognized timeliness as an implicit requirement under §455. Because of this recent decision and the uniformity of the circuit courts' decisions on timeliness for more than a decade, it is unnecessary for this Court to grant petitioner's request for a writ of certiorari.

Petitioner's own citations of various circuit courts' decisions show agreement and recognition that a timeliness requirement is appropriate when courts consider motions filed pursuant to 28 U.S.C. §455. *See Delesdernier v. Porterie*, 666 F.2d 116, 121 (5th Cir. 1982) ("Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem."); *In Re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1982) ("[W]e have without explication previously assumed that timeliness was also requisite under the amended statute [§455]."). Petitioner quotes several appellate opinions which are contrary to her assertion that motions pursuant to §455 need not be timely filed. *See* Petition, pgs. 8-9 and *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1164 (5th Cir. 1982); *Oglala Sioux Tribe v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983); *United States v. Conforte*, 624 F.2d, 869, 880 (9th Cir.

1980), *cert. denied*, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980).

Petitioner also misplaces reliance for support of her position on Tenth Circuit cases; the Tenth Circuit has stated that "[w]e are not prepared to say that timeliness should always be disregarded with respect to §455 recusals." *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982), *citing United States v. Conforte*, 624 F.2d 869, 879-880. In *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir. 1976), a case in which the disqualification motion was filed over a year after the proceedings giving rise to the alleged bias, the Tenth Circuit found the motion untimely. The court cited with approval *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978), in which the Third Circuit stated: "[T]he judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming."

In *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), the Tenth Circuit found a motion to recuse untimely when events were alleged to have occurred three months prior to the time the motion was filed. The *Hinman* court stated that: "A motion to recuse must be filed promptly after the allegedly disqualifying facts are discovered." 831 F. 2d at 938. The Tenth Circuit clearly has followed the position of other circuit courts. *See Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1396, 84 L.Ed.2d 785 (1985) (motion to recuse under both 28 U.S.C. §§ 144 and 455(a) was untimely); *Oglala Sioux Tribe*, 722 F.2d 1407; *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed. 2d 189 (1984); *Chitimacha Tribe*, 690 F.2d 1157; *IBM Corp.*, 618 F.2d 923. The Tenth Circuit also reiterated its holding in *Dorothy Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988).

In the present case, the Tenth Circuit's opinion that motions for disqualification pursuant to 28 U.S.C. §455 must be timely filed is consistent with those of every circuit court, save one. The Fifth Circuit in *Delesdernier,* noted that "[o]nly the Seventh Circuit has stated its opposition to any timeliness requirement." 666 F.2d at 122, f.n. 3, *citing SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977). In fact, *Morgan,* 557 F.2d 110, is the only case petitioner cites which supports her position that timeliness is not required for a motion filed pursuant to §455. In a case decided after *Morgan,* the Seventh Circuit stated:

> Our decision stands alone, however. The Fifth Circuit has called the discussion in *Morgan* dicta and rejected the conclusion on the merits, reasoning that Congress did not put a time limit in §455 because time limits were already so firmly fixed in both statute and common law that there was no need to add another.

United States v. Murphy, 768 F.2d 1518, 1539 (7th Cir. 1985). More recently the Seventh Circuit recognized that "[a]lthough *SCA Services, Inc. v. Morgan, supra,* 557 F.2d at 117, holds that there are no time limits on motions to disqualify under 28 U.S.C. §455, this position has been uniformly rejected in the other circuits." *Union Carbide Corp. v. U.S. Cutting Service, Inc.,* 782 F.2d 710, 716 (7th Cir. 1986). In *Union Carbide,* the Seventh Circuit explicitly stated that "*Murphy* questions" the *Morgan* opinion and another Seventh Circuit decision "undermines it by stressing the importance of promptly raising any ground for questioning the judge's impartiality." 782 F.2d at 716. In view of other grounds for its rejecting recusal under §455(a) in both *Murphy* and *Union Carbide,* the Seventh Circuit found it had "no need to decide whether to reconsider *Morgan,*" but the court cast considerable doubt upon its earlier viewpoint. *Murphy,* 768 F.2d at 1539; *see also Union Carbide,* 782 F.2d at 717.

Petitioner's statement that there is "confusion in the circuits over a timeliness requirement under §455" (Petition, p. 10) is not

substantiated by decisions of the circuit courts. *See also Marcus v. Director, Office of Workers' Compensation Program,* 548 F.2d 1044, 1050 (D.C. Cir. 1976) ("[W]hen a party voices its misgivings in tardy or dilatory fashion . . . the good faith of the claimant will quite naturally be placed in some doubt."); *Satterfield v. Edenton-Chowan Board of Education,* 530 F.2d 567, 574-75 (4th Cir. 1975) ("A claim of disqualifying bias or partiality . . . must be asserted promptly after knowledge of the alleged disqualification."); *United States v. Patrick,* 542 F.2d 381, 390 (7th Cir. 1976) (knowledge of facts alleged to support disqualification motion must be raised at the earliest possible moment).

The legislative history of the 1974 amendment to 28 U.S.C. §455 is not decisive about whether Congress intended to preserve the former judicial gloss wherein courts had generally held that a timely objection under the old §455 was necessary. *See, e.g., Adams v. United States,* 302 F.2d 307, 309 (5th Cir. 1962). Thus, Congress' failure to state an explicit timeliness requirement for §455 "could as easily have been the result of a belief that the judicial gloss on old section 455 would survive." *Delesdernier,* 666 F.2d at 121, *citing* Note, *Disqualification of Federal Judges for Bias or Prejudice,* 46 U. Chi. L. Rev. 236, 263 (1978). Certainly, it appears that the circuit courts have continued the judicial gloss on the old §455 since 1974.

Petitioner's own case does not warrant the court's attention because petitioner filed her two motions for disqualification of the trial judge four and one-half years and six years respectively after she had initiated her case. "The timeliness requirement is an important guard against abuse; without it, a party could sample the temper of the court . . . before deciding whether to file . . ." Note, *supra* at 262 (1978). In the present action, the trial judge considered his association with the alumni association and with the law school society of the University and found that his recusal was not required. *See Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied,* 455 U.S. 1027, 102

S.Ct. 1731, 72 L.Ed.2d 148 (1982) ("[A]n alumnus' interest in the general welfare of his alma mater hardly seems likely to manifest itself in a bias concerning a single staff employment decision.") Judge Rogers' alumni association service does not exceed what might be expected as background or associational activities with respect to the usual district judge. *See Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98, 104 (5th Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The Tenth Circuit reviewed the district court decision and found that the denial of the untimely motions did not constitute an abuse of discretion.

This case presents the single issue of whether the U.S. Court of Appeals for the Tenth Circuit was correct in holding that petitioner's motions for disqualification were untimely. Almost without exception, the appellate courts have found that timeliness is required for a motion filed pursuant to §455. The decision of the trial court and the appellate court was correct and fair. The question presented in this case is not sufficiently important to warrant this Court's attention.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

(August 30, 1984)

ANN R. WILLNER,
Plaintiff

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 79-4069-W

In the United States District Court
for the District of Kansas

O R D E R

This matter is presently before the court upon plaintiff's motion for disqualification of the court pursuant to 28 U.S.C. § 455(a) and 455(b)(1). Having carefully considered the materials before the court, I am now prepared to rule.

In this motion, plaintiff suggests basically three reasons why my impartiality should be questioned in this case: (1) that I was a director of the University of Kansas Alumni Association at the outset and during the pendency of this action; (2) that plaintiff has been informed that I was heard to make the following statement with regard to sex discrimination cases filed by females of the defendant University of Kansas: "Those women over there! If they don't get the high-paying jobs they want, they holler discrimina-

tion.''; and (3) that plaintiff's observation of my demeanor in an earlier hearing in this case indicated prejudice against her.

Recently, the court considered a motion for disqualification virtually the same as the instant motion. *See Willner v. University of Kansas,* No. 82-4291 (D. Kan., unpublished, 8/29/84). There, plaintiff, a sister of the plaintiff here, sought to have the court disqualified for three reasons, the first two identical to those mentioned in this case. For the reasons stated in that order, I find no reason to recuse myself from this case for the first two reasons stated in the plaintiff's motion here. I have attached a copy of my opinion in that case to this order.

The court shall now address the third reason stated by the plaintiff here. Plaintiff contends that my demeanor coupled with certain statements I made at a hearing in this case on June 8, 1983, requires that I disqualify myself from hearing this case. Plaintiff suggests that my attitude indicated personal bias and prejudice against her.

Under 28 U.S.C. § 455, the alleged bias or prejudice must be ''personal'', as distinguished from judicial, in nature. *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). Thus, a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench. *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966). However, the single fact that a judge's remarks or behavior take place in a judicial context does not exclude them from scrutiny if they reflect ''such pervasive bias and prejudice . . . as would constitute bias against a party.'' *Davis v. Board of School Commissioners of Mobile County, supra,* at 1051. *Also see United States v. Ritter,* 540 F.2d 463 (10th Cir. 1976), *cert. denied,* 429 U.S. 951 (1976).

Plaintiff asserts that the statements made by the court at the hearing on June 8, 1983, in this case indicate bias and prejudice against her. Plaintiff is correct that the court did make certain statements at that hearing regarding the number of the attorneys that have represented plaintiff in this case, the number of delays that have occurred in the case, and the number of discrimination cases pending before the court. These statements were made in an effort to determine why this case has progressed so slowly in my court. The types of questions put to the plaintiff by the court and the types of statements made by the court are not unusual when I am faced with a case that has been pending for 3 1/2 years. The court readily admits that I sometimes find it necessary to sharply question both attorneys and *pro se* litigants of both sexes when I perceive certain problems in a case. My review of my comments at that hearing do not indicate a personal bias or prejudice against the plaintiff but rather only indicate my displeasure with the slow progress of this case. I find no reason to recuse myself for the comments made at the hearing of June 8, 1983. Accordingly, plaintiff's motion for disqualification shall be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for disqualification be denied.

Dated this 29th day of August, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX B

(August 30, 1984)

DOROTHY WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET WHITE, FELIX MOOS, JOHN M. JANZEN, MICHAEL CRAWFORD, DAVID FRAYER and DONALD STULL,
Defendants.

Case No. 82-4291

In the United States District Court
for the District of Kansas

MEMORANDUM AND ORDER

This is an employment discrimination action brought by the plaintiff pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000e *et seq.* (Title VII); 29 U.S.C. § 206(d) (Equal Pay Act); 20 U.S.C. § 1681, *et seq.* (Title IX); and the United States Constitution. Named as defendants are the University of Kansas; Archie R. Dykes, Chancellor; Delbert M. Shankel, Executive Vice CHancellor[sic]; Frances D. Horowitz, Vice Chancellor, Dean of Graduate School, Associate Dean of Liberal Arts College; Robert P. Cobb,

Executive Vice Chancellor, Dean of Liberal Arts College; Robert S. Hoffman, Associate Dean of Liberal Arts College; Robert J. Squier, Acting Chairman of Department of Anthropology; Anta Montet White, Chairman of Department of Anthropology; Felix Moos, Associate Chairman of Department of Anthropology; John M. Janzen, Associate Chairman of Department of Anthropology; David Frayer, Associate Professor of Anthropology; and Donald Stull, Associate Professor of Anthropology. This matter is presently before the court upon the following motions: (1) defendants' motion for more definite statement (Doc. #19); (2) defendants' motion to dismiss (Doc. #20); and (3) plaintiff's motion to disqualify the court (Doc. #78). Having carefully reviewed the pleadings that have been filed by both sides, the court is now prepared to rule.[1]

Plaintiff, with the aid of counsel, filed this case on December 1, 1982. Plaintiff's counsel has since withdrawn and now plaintiff is proceeding *pro se*. In her complaint, plaintiff alleges that she is a 55 year old Jewish American female. She further alleges that she has been employed by the University of Kansas as an anthropology professor since 1966. She contends that during her employment she has been discriminated against by the defendants in a variety of ways because of her race and sex. Plaintiff seeks actual damages in excess of $1,000,000.00 and punitive damages in excess of $2,000,000.00.

The court shall first consider plaintiff's motion for disqualification pursuant to 28 U.S.C. § 455(a) and 455(b)(1). In this motion, plaintiff suggests three reasons why my impartiality should be questioned in this case: (1) that I was a director of the University of Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment

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1. On December 14, 1983, plaintiff asked for additional time to reply to defendants' motion to dismiss. The court granted plaintiff's motion without indicating a specific time for filing the supplemental material. To date, plaintiff has submitted nothing further with regard to the motion to dismiss. The court finds that it is now time to decide the motion.

Opportunity Commission; (2) that plaintiff has been informed that I was heard to make the following statement with regard to sex discrimination cases filed by females by the defendant University of Kansas: "Those women over there! If they don't get the high-paying jobs they want, they holler discrimination."; and (3) that plaintiff has observed my demeanor during a hearing toward another female plaintiff proceeding *pro se* and questions whether I am able to give full consideration to females litigating sex discrimination cases on their own behalf. I shall discuss each of these contentions specifically. However, I should initially discuss the general standards governing a motion to disqualify.

There are two statutes governing recusal of federal district judges: 28 U.S.C. §§ 144 and 455. Plaintiff seeks to invoke § 455 in support of her motion for disqualification. That statute provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Although the statute imposes a self-enforcing duty upon the judge, its provisions may also be asserted by a party to the proceeding. *United States v. Gigax*, 605 F.2d 507, 511 (10th Cir. 1979).

Section 455(b)(1) is substantially similar to 28 U.S.C. § 144. Courts have concluded that the standards for disqualification for personal bias are identical under both. *See, e.g., United States v. Gigax, supra*, at 512; *United States v. Wolfson*, 558 F.2d 58, 62 (2d Cir. 1977). The standard is whether a reasonable person would conclude, on the basis of the facts alleged, that a judge is biased or prejudiced against a particular litigant. *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012

(1980). To warrant disqualification of a judge under this section, a party must allege personal, extra-judicial bias or prejudice. *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 965 (5th Cir. 1980).

Section 455 (a) is broader and more general in nature than either 28 U.S.C. § 144 or § 455(b)(1). It does not rest on the personal bias or prejudice structure of those two sections. It mandates that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." This provision was added in 1974, and designed as a "catch-all" for situations not otherwise contemplated under the statutes but in which disqualification might be proper. *Rice v. McKensie*, 581 F.2d 1114, 1116 (4th Cir. 1978). Section 455(a) represents a recognition by Congress that the appearance of impartiality is as important as the fact of impartiality, *Webb v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977), and its wording is borrowed from the ABA Code of Judicial Conduct. *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir. 1976), *cert. denied*, 429 U.S. 951 (1976). Disqualification is warranted under this provision when a reasonable person measured by an objective standard would infer that a judge's impartiality might reasonably be questioned. *United States v. Gigax, supra*, at 511. Application of this "reasonable, objective man" standard must proceed in the context of allegations of concrete fact. *United States v. Corr*, 434 F.Supp. 408 (S.D.N.Y. 1977). A charge of partiality must be supported by a factual basis. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Rumors and innuendos must be ignored in considering whether disqualification is appropriate. *Id.* Section 455(a) should not be interpreted to require recusal on spurious or vague charges of impartiality. *Smith v. Pepsico*, 434 F.Supp. 524 (S.D. Fla. 1977).

The court shall now consider the various specific allegations made by the plaintiff in her motion. Plaintiff first suggests that I should disqualify myself from this case because I was a director of

the University of Kansas Alumni Association when plaintiff filed her charge of discrimination against the University of Kansas with the Equal Employment Opportunity Commission. Assuming this to be true, and I do believe that the dates of my prior service as a director of Alumni Association do coincide with plaintiff's filing of her charge with the EEOC, I find this fact insufficient to require my recusal in this case.

Plaintiff does not allege nor could she allege that I acquired any facts concerning this case during my service as a director with the University Alumni Association. The court has no knowledge of this case other than what I have learned from perusing the court file.

I do not believe my past association with the Alumni Association demonstrates actual bias under the circumstances of this case and I do not think that a reasonable man would doubt my impartiality under these circumstances. The mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, is generally insufficient to mandate disqualification. *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981). I have reviewed a number of cases arising under § 455 and I do not think that my association with the Alumni Association is nearly as significant as other associations which have been found by various courts not to require recusal. *See, e.g., Huff v. Standard Life Ins. Co.*, 683 F.2d 1363 (11th Cir. 1982) (recusal not required where trial judge had previous affiliation with defendant's law firm); *Schultz v. Newsweek*, 668 F.2d 911 (6th Cir. 1982) (recusal not required where defendant newspaper in published editorials had supported trial judge's nomination to Circuit Court position); *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) *(en banc), cert. denied*, 425 U.S. 944 (1976) (recusal not required in race discrimination action against state bar association in which trial judge was a member); *Warner v. Global Natural Resources PLC*, 545 F.Supp. 1298 (S.D. Ohio 1982) (recusal not required

where trial judge had acquaintanceship with plaintiff and plaintiff had supported judge's nomination to the bench); *State of Idaho v. Freedman*, 478 F.Supp. 33 (D. Idaho 1979) (recusal not required in case challenging ratification procedure for Equal Rights Amendment where trial judge held "prominent position" in the Mormon Church); *Black v. Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975) (recusal not required in sex discrimination class action where trial judge was previously an NAACP litigator). In sum, I find my prior service with the University of Kansas Alumni Association insufficient to require recusal here.

I now move to consideration of the statement allegedly made by me concerning sex discrimination cases filed by females at the University of Kansas. The presentation of this allegation presents much the same situation as that in *United States v. Hines*, 696 F.2d 722 (10th Cir. 1982). There, the defendant sought to disqualify the trial judge pursuant to 28 U.S.C. §§ 455(a) and 455(b)(1) based on a statement made by the judge. The defendant submitted an affidavit stating that someone had toid him that the judge, sometime in November or December, 1979, while dining with friends at an unnamed dinner club in Tulsa, Oklahoma, stated to an unnamed person that he was "going to see to it that [Mr. Hines] gets put away." The trial judge refused to recuse himself and the Tenth Circuit affirmed. In finding that the defendant had failed to show adequate proof of prejudice or bias, the Court stated:

> Mr. Hines' affidavit fails to state with reasonable particularity when, where, and to whom the statement was made, nor has he identified the informant who heard the statement and reported it to Mr. Hines. His counsel also concedes that, notwithstanding the attorney-client privilege, Mr. Hines has not identified to him the source of the statement. Record, vol. 1, at 139. Mr. Hines states in summary fashion that the informant was known to him to be reliable and to have been in a position to hear the judge's statement, but he offers no underlying facts to support either his opinion of the informant's reliability or his belief that the informant was in a

> position to hear the statement. Justice would be impeded by a policy mandating recusal on such scant submissions. Although we acknowledge that the intent in amending section 455 was to negate even the appearance of partiality in judicial proceedings, section 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.

Id., at 729.

The statements made by the Tenth Circuit in *Hines* are particularly instructive here. In her motion, plaintiff fails to state with any particularity when, where and to whom the statement was made, nor has she identified who heard the statement and reported it to her. In accord with *Hines*, I find that plaintiff has failed to show sufficient proof of bias, prejudice or partiality.

Finally, I shall consider plaintiff's last allegation of prejudice or bias. Plaintiff contends that my demeanor in a hearing in another case concerning another female *pro se* plaintiff indicates some prejudice or bias against all females who are prosecuting cases in their own behalf. The law is clear that this allegation is insufficient for several reasons. First, as noted previously in this opinion, to warrant disqualification of a judge under § 455, a party must allege personal bias or the appearance of partiality arising out of that bias. Plaintiff's contention fails to allege any bias which could be considered "personal" to her. Second, plaintiff's allegation presents nothing more than her conclusions regarding my demeanor at some prior hearing in another case. The law is clear that only facts, and not conclusions, will serve as a basis for disqualification. *United States v. Bennett*, 539 F.2d 45 (10th Cir. 1976), *cert. denied*, 429 U.S. 925 (1976). Finally, the bias and prejudice under § 455 must be extra-judicial. Disqualifying bias, with certain limited exceptions none of which are applicable here, may not arise out of the proceedings in court before the judge. Thus, I find recusal is not required by this allegation made by plaintiff. *See Jackson v.*

Alabama Dept. of Public Safety, 657 F.2d 689 (5th Cir. 1981) (comments made by trial judge in another judicial proceeding do not require recusal).

In sum, I find plaintiff has not shown actual bias or prejudice and I do not think that a reasonable man would doubt my impartiality under the circumstances presented. Accordingly, plaintiff's motion for disqualification shall be denied.

Having decided the motion for disqualification, I shall move to the other motions presently pending in this case. The court shall first consider defendants' motion for a more definite statement. In this motion, defendants seek to have plaintiff provide a number of factual details regarding the allegations made by her in her complaint.

In *Grant v. Rusty's Food Center, Inc.*, No. 82-4289 (D. Kan., unpublished, 1/20/83), the court set forth the following standards for examining a motion for more definite statement:

> The decision whether to grant a motion for a more definite statement is a matter within the discretion of the trial court. *United States v. Metro Development Corp.*, 61 F.R.D. 83, 85 (N.D. Ga. 1973). Such motions, however, are generally disfavored. *Usery v. Local 866, International Brotherhood of Teamsters*, 72 F.R.D. 581, 582 (W.D. Okla. 1976). If a pleading meets the requirements of F.R.Civ.P. 8 and fairly notifies the opposing party of the nature of the claim, a motion for more definite statement should not be granted. *Wishnick v. One Stop Food & Liquor Store, Inc.*, 60 F.R.D. 496, 498 (N.D. Ill. 1973). In 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1376, p. 733, the rule regarding motions for a more definite statement is succinctly stated as follows:
>
> > [T]he class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small—the pleading must be sufficiently intelligible for the court to be able to make out one or more potentially viable legal theories on which the claimant might proceed, but it must be so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.

> Moreover, it has been recognized that the purpose of a Rule 12(e) motion is "to strike at unintelligibility rather than want of detail." *U-Profit, Inc. v. Bromley, Ltd.*, 54 F.R.D. 60, 66 (E.D. Wis. 1971).

After reviewing plaintiff's complaint, we find that it sufficiently complies with Fed.R.Civ.P. 8. Further details about plaintiff's complaint can be obtained through interrogatories, depositions and other discovery. Accordingly, defendants' motion for more definite statement shall be denied.

In the motion to dismiss, defendants raise a number of issues. Many of these matters are familiar to the court. The court shall summarily dispose of several of the issues without discussion. The remaining questions will be discussed.

1. Plaintiff's claims against the defendant University of Kansas and the individual defendants in their official capacities pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 are barred by the Eleventh Amendment. *Pennhurst State School and Hospital v. Halderman*, _____ U.S. _____ (January 24, 1984); *Brennan v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971); *Logan v. State of Kansas Department of Human Resources*, No. 83-4321 (D. Kan., unpublished, 6/12/84). These claims shall be dismissed. With the dismissal of these claims, the court shall also dismiss plaintiff's claim for attorney's fees against the University pursuant to 42 U.S.C. § 1988.

2. Compensatory and punitive damages are not allowable under Title VII. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Pearson v. Western Electric Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976); *Hinman v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). Any claim for such damages by plaintiff under Title VII shall be dismissed.

3. 42 U.S.C. § 1981 does not encompass claims based on sex or religious discrimination. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979).

4. Plaintiff cannot obtain equitable relief in the form of back pay from the individual defendants under Title VII. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981); *Dobrec v. Robinson*, No. 79-1671 (D. Kan., unpublished, 6/1/84). Such claims made by plaintiff are dismissed.

5. There is no right to a jury trial under Title VII. *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979). This claim shall be tried to the court.

6. Plaintiff's claims against the University and the individual defendants brought directly under the Constitution pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) shall be dismissed. *Howard v. Topeka-Shawnee County Metropolitan Planning Commission*, No. 80-4199 (D. Kan., unpublished, 2/7/83); *Lee v. Wyandotte County*, No. 81-4276 (D. Kan., unpublished, 1/27/84).

The court shall now discuss the remaining issues raised by the defendants. We shall first address the service of process issues. Defendant University and defendant Horowitz contend that they were improperly served here. Plaintiff, in response to defendants' motion, has again served both the University and Horowitz. This additional service by plaintiff adequately complies with service requirements and thus we now find no merit to the defendants' arguments.

The individual defendants assert several arguments that plaintiff's claims under §§ 1983, 1985 and 1986 should be dismissed for failure to state a claim upon which relief can be granted. The gist of these contentions is that the complaint is bereft of facts to adequately state constitutional or statutory claims. The general rule with regard to such arguments is that complaints should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). This complaint is

indeed not a model of pleading but we find it is sufficient to avoid a motion to dismiss for failure to state a claim. Several of these arguments might again be raised in a motion for summary judgment if discovery fails to reveal facts necessary to support these claims.

All defendants assert that plaintiff has adequately failed to plead a cause of action under the Equal Pay Act (EPA). The court has carefully examined plaintiff's complaint and we believe that a fair reading of that complaint adequately states a claim under the EPA. Accordingly, we shall not dismiss plaintiff's EPA claim against the defendants.

We now move to defendants' argument that plaintiff has failed to state a claim under § 1981 and Title VII based on race discrimination. Defendants argue that these statutes do not encompass racial discrimination based on the fact that an individual is Jewish. Plaintiff, relying upon *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979), contends that she can sue as a Jew under § 1981 and Title VII for race discrimination.

Section 1981 provides, *inter alia*, that all persons within the United States shall enjoy the same rights and benefits of law as are "enjoyed by white citizens." The Supreme Court has held that the scope of § 1981 applied to acts of racial discrimination. *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975). It does not apply to discrimination based on sex or religion. *Runyon v. McClary*, 427 U.S. 160, 167 (1976). The Court has left open the question as to whether § 1981 applies to discrimination based on national origin. *Delaware State College v. Ricks*, 449 ULS. 250, 256 n. 6 (1980).

This court has applied the teaching of *Manzanares* in the past to allow and disallow § 1981 claims of discrimination based on a variety of ethnic or national origins. *See Fernando v. Brock Hotel Corp.*, No. 83-4057 (D. Kan., unpublished, 12/12/83) (allowed for Indian ancestry); *Schlaefli v. Daniel International Corp.*, No.

80-4052 (D. Kan., unpublished, 8/31/82) (allowed for American Indian); *Elkassabany v. King Radio Corp.*, No. 79-4193 (D. Kan., unpublished, 10/3/80) (allowed for Egyptian); *Mills v. American Yearbook Co., Inc.*, No. 81-4222 (D. Kan., unpublished, 7/26/82) (not allowed for Finnish ancestry); *Cavanaugh v. Harris Enterprises, Inc.*, No. 79-4177 (D. Kan., unpublished, 3/19/80) (not allowed for German).

Title VII is violated by discrimination on the basis of "race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (c)(1). Plaintiff's complaint alleges solely sex and race discrimination. The complaint makes no mention of any discrimination based on religion or national origin. Thus, we consider plaintiff's Title VII claim as only a race and sex discrimination claim.

After examining the case law on this issue, we are forced to reach the conclusion that Jews do not constitute a race for purposes of § 1981 or Title VII. *Wald v. Teamsters*, 25 E.P.D. ¶ 31,497 (C.D. Cal. 1980). The court finds itself in agreement with the comments of the court in *Budinsky v. Corning Glass Works*, 425 F.Supp. 786 (W.D. Pa. 1977). There, the court, in dismissing a Slavic plaintiff's § 1981 claim of racial discrimination, stated:

> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . . . On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination." Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." . . . .
>
> *The same cannot be said with respect to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981.* (emphasis added)

Id., at 788.

Therefore, we shall dismiss plaintiff's claims of racial discrimination based on § 1981 and Title VII.

Defendants next argue that there are several problems with plaintiff's Title VII claim. Defendants first suggest plaintiff's Title VII claim should be dismissed because her complaint fails to adequately allege that her administrative charge of discrimination was deferred to the Kansas Commission on Civil Rights (KCCR) as required by 42 U.S.C. § 2000e-5(c). Defendants note that plaintiff's complaint indicates only that plaintiff filed a charge of discrimination with the EEOC on April 27, 1981. In response, plaintiff has submitted documents which show that the EEOC received plaintiff's charge on April 27, 1981, and transmitted it to the KCCR on April 28, 1981. The documents further indicate that the KCCR declined to process the charge.

Once a state agency is given the opportunity to act and declines to do so, the EEOC can proceed at once to deal with the complainant's charge of discrimination. *Willner v. University of Kansas*, No. 79-4069 (D. Kan., unpublished, 5/1/80). The failure of a complainant to file charges with the state agency is not a fatal jurisdictional defect where the charge is filed with the EEOC, which as matter of policy, refers such complaints to the proper state agency. *Heiniger v. City of Phoenix*, 625 F.2d 842 (9th Cir. 1980). Given the facts presently before the court, we shall not dismiss plaintiff's Title VII claim.

Defendants next argue that plaintiff's Title VII claim should be dismissed because plaintiff's EEOC charge shows that it was not filed within 180 days of any alleged violations by the defendants. We cannot agree. The court finds that the EEOC charge sufficiently alleges violations of Title VII within 180 days of its filing. Accordingly, we find no merit to this argument. However, we do note that several of the allegations do appear to be outside the 180 time restriction. We believe that these matters should probably be addressed in a motion for summary judgment after discovery is complete.

Finally, certain individual defendants contend that plaintiff's Title VII claim against them should be dismissed because they were not named in plaintiff's EEOC charge of discrimination. The court has addressed this issue a number of times.

In *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980), the Tenth Circuit examined this issue and found that four factors should be considered in deciding whether a defendant unnamed in the EEOC charge could be named later in a Title VII suit. The four factors are:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id., at 1312.

The court is and has always been reluctant to decide this issue on a motion to dismiss. We find it is better resolved after some discovery has been taken in the case. The instant case is no exception. Thus, we shall await a motion for summary judgment before thoroughly examining this issue.

The court shall now move to defendants' arguments regarding plaintiff's Title IX claim. The University first asserts that plaintiff's Title IX claim against it is barred by the Eleventh Amendment. The court agrees.

A clear showing of congressional intent is required to abrogate Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). No such congressional purpose is present here and thus

we find that plaintiff's Title IX action against the University is barred by the Eleventh Amendment.

Defendants also raise several other arguments concerning the Title IX claim. Defendants contend that plaintiff has no cause of action under Title IX because she has received no federal grants or funding. Defendants made this argument prior to the Supreme Court's decision in *Grove City College v. Bell*, _____ U.S. _____ (February 28, 1984). The court believes that both sides should examine this case before we decide this issue. At this time, we shall deny defendants' motion to dismiss based upon this argument but we shall allow defendant to raise it at a later date if they believe that *Grove City College* requires it.

As to defendants' remaining arguments regarding plaintiff's Title IX claim, the court believes they are meritorious. There is no right to damages or jury trial under Title IX. *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).

Defendants next argue that plaintiff's slander claim fails to state a claim under § 1983. The court agrees. Claims of defamation by a state official, when no termination of employment is involved, are not cognizable under § 1983. *Paul v. Davis*, 424 U.S. 693, 710 (1976). Plaintiff contends that the court should consider this claim under its pendent jurisdiction if a § 1983 claim is not stated. The court will do so but only to the extent that such a claim is stated within the applicable one year statute of limitations. If discovery reveals that no such claim arose between December 1, 1981 to December 1, 1982, this claim shall be dismissed.

Finally, we shall consider defendants' statute of limitations argument. Defendants seek to have the court rule that plaintiff's claims under §§ 1981, 1983 and 1985 prior to either December 1, 1981 or December 1, 1980, are barred by the applicable statute of limitations. At this point, we are inclined to find, based upon the recent pronouncements of the Tenth Circuit, that December 1,

1979, is the key date, three years prior to the filing of plaintiff's complaint. *See Cotton v. Board of Education of U.S.D. # 259,* No. 82-4082 (D. Kan., unpublished, 5/3/84). The court shall examine this issue closer after discovery reveals the exact nature of plaintiff's claims.

The court notes that the individual defendants have recently filed a motion to dismiss. A hearing on this motion is hereby scheduled for September 18, 1984, at 8:30 a.m., in Room 401 of the Frank Carlson Federal Building, 444 S.E. Quincy, Topeka, Kansas.

IT IS THEREFORE ORDERED that plaintiff's motion for disqualification be denied.

IT IS FURTHER ORDERED that defendants' motion for more definite statement be denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss be granted in part and denied in part.

IT IS FURTHER ORDERED that the pending motion to dismiss filed by the individual defendants shall be scheduled for a hearing on September 18, 1984, at 8:30 a.m.

IT IS SO ORDERED.

Dated this 29th day of August, 1984, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

APPENDIX C

(March 11, 1985)

ANN R. WILLNER,
Plaintiff,

vs.

UNIVERSITY OF KANSAS,
Defendant.

Case No. 79-4069-W

In the United States District Court
for the District of Kansas

O R D E R

This matter is presently before the court upon the following motions: (1) plaintiff's motion for disqualification and stay of action; and (2) plaintiff's motion for jury trial on Equal Pay Act (EPA) claims. Having carefully reviewed the materials before the court, I am now prepared to rule.

The court shall first consider plaintiff's motion for disqualification pursuant to 28 U.S.C. § 455(a). In this motion, plaintiff seeks to have me disqualify myself from this case because during the pendency of this action I served on the Board of Governors of the law school of the defendant University of Kansas. Plaintiff has previously moved for disqualification of the court in this case for other reasons. On August 30, 1984, I denied that motion. *See* Doc. # 311. In that order and in an order I attached to that order, I detailed the general standards governing a motion to disqualify under § 455. I find it unnecessary to restate those standards in this order. In that order I rejected plaintiff's contention that I should

disqualify myself because I had been a director of the University of Kansas Alumni Association during the time period this case has been in my court. For the reasons stated in that order and in the order attached to that order, I find that plaintiff's present allegations do not require disqualification from this case. As I stated previously, the mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, is insufficient to mandate disqualification. *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982). Accordingly, plaintiff's motion for disqualification shall be denied. Additionally, plaintiff's motion for stay shall be denied.

The court shall now consider plaintiff's motion for trial by jury on her EPA claims. At the pretrial conference, it was discovered that the plaintiff had not filed a demand for jury trial in this case. As a result, the pretrial order indicates that all claims in this case shall be tried to the court. Thereafter, plaintiff filed the instant motion. Plaintiff suggests that her former attorneys are to blame for her failure to file a demand for trial by jury on her EPA claims. Plaintiff asserts that she was never advised of her right to a jury trial by her past attorneys. Defendant contends that plaintiff's motion should be denied because she has waived her right to trial by jury. Defendant suggests that it would be "greatly prejudiced" if this motion was granted.

A party proceeding under the EPA does have the right to a jury trial. *Lazarus v. State of Maryland*, 79 F.R.D. 633, 635 n. 2 (D. Md. 1978); *Altman v. Stevens Fashion Fabrics*, 441 F.Supp. 1318, 1322 (N.D. Cal. 1977). *Also see Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 952 (10th Cir. 1980). However, a party who desires trial by jury in an EPA case must file and serve a timely written demand for jury trial. Fed.R.Civ.P. 38(b). Rule 38(b) requires that a demand for a jury trial be served within ten days after service of the "last pleading directed to such issue." The failure of a party to serve a timely demand as required by Rule 38(b) constitutes a waiver by

her of trial by jury. Fed.R.Civ.P. 38(d); *United States v. Moore*, 340 U.S. 616, 621 (1951). Fed.R.Civ.P. 39(b), however, provides that possibility of relief from such waiver in that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all of the issues."

Generally, absent strong and compelling reasons to the contrary, a trial court should exercise its discretion in favor of granting an untimely request for a jury. *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965). After carefully reviewing the background in this case, the court finds that plaintiff's motion should be granted. There are obviously reasons why this motion could be denied but we do not find them strong or compelling. The court fails to see any prejudice to the defendant arising from the granting of this motion. Therefore, despite the fact that this motion comes extremely late in the course of this case, the court shall grant this motion and allow plaintiff a jury trial on her EPA claims. *See Grayson v. Wickes Corp.*, 450 F.Supp. 1112, 1113-14 (N.D. Ill. 1978), *aff'd*, 607 F.2d 1194 (7th Cir. 1979).

The court hopes that this action can now proceed to trial as soon as possible. The court intends to schedule this case for trial in the near future.

IT IS THEREFORE ORDERED that plaintiff's motion for disqualification and stay be hereby denied.

IT IS FURTHER ORDERED that plaintiff's motion for jury trial on Equal Pay Act claims be hereby granted.

IT IS SO ORDERED.

Dated this 11th day of March, 1985, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge